**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**
**----------x**
**LOUIS FLORES,**

**Plaintiff,**

**-against-**

**UNITED STATES DEPARTMENT OF JUSTICE,**

**Defendant.**
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**REPORT AND RECOMMENDATION**

**15-CV-2627 (JMA)**

**ROANNE L. MANN, CHIEF UNITED STATES MAGISTRATE JUDGE:**

On April 30, 2013, *pro se* plaintiff Louis Flores ("plaintiff") submitted a Freedom of Information Act ("FOIA" or the "Act") request to the Executive Office for the United States Attorneys ("EOUSA"), seeking certain records related to the criminal prosecution of Daniel Choi and other activists by the United States Department of Justice ("DOJ" or "defendant"). See Amended Complaint (Sept. 23, 2015) ("Am. Compl.") ¶ 4, Electronic Case Filing ("ECF") Docket Entry ("DE") #15. After two years without a reply, plaintiff sued under 5 U.S.C. § 552(a)(4)(B) to compel DOJ to release responsive documents. See Am. Compl. ¶¶ 1, 8. After plaintiff sued, EOUSA informed him that no responsive documents could be located, but voluntarily provided him with other, nonresponsive records concerning the Choi prosecution. See Am. Compl. ¶ 8. Plaintiff believes that additional, responsive documents exist, and that defendant has "deliberately omitt[ed] responsive records" in "bad faith[.]" Id. DOJ asserts that it complied with FOIA because EOUSA and the United States Attorney's Office for the District of Columbia ("USAO-DC") have "conducted diligent and reasonable[,]" though unsuccessful,

searches for responsive documents. Memorandum of Law in Support of Defendant's Motion for Summary Judgment (Nov. 23, 2015) ("Def. SJ Mem.") at 1, DE #20-2.

Defendant now moves for summary judgment on all of plaintiff's claims, see id. at 23, while plaintiff cross-moves for partial summary judgment, see Plaintiff's Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment (Jan. 5, 2016) ("Pl. SJ Mot."), DE #24, and has also filed a separate cross-motion under Rule 52 of the Federal Rules of Civil Procedure ("FRCP"), demanding a preliminary injunction, sanctions, and penalties, see Plaintiff's Cross Motion Under Rule 52 and Demand for Sanctions and Penalties (Jan. 5, 2016) ("Pl. R. 52 Mot."), DE #25.

For the following reasons, the Court respectfully recommends that defendant's motion for summary judgment be granted in its entirety, and that plaintiff's cross-motions be denied.

## BACKGROUND

Plaintiff is an "openly gay journalist and activist[,]" "committed to principles of transparency and accountability in government[,]" who maintains several political websites. Am. Compl. ¶ 14. In March 2013, while researching a blog post for one of those websites, plaintiff began exchanging emails with USAO-DC staff regarding the prosecution of Daniel Choi. See Declaration of Assistant U.S. Attorney Rukhsanah L. Singh (Nov. 23, 2015) ("Singh Decl."), Exs. B–F, DE #20-4. Mr. Choi, a former lieutenant in the U.S. Army, gained recognition as an opponent of the "don't ask, don't tell" policy ("DADT"), since repealed, which barred gays and lesbians from serving openly in the armed forces. See Am. Compl. ¶ 4. During a November 2010 protest against DADT, Mr. Choi and other activists

were arrested outside the White House. See Singh Decl., Ex. A (the "4/30/13 FOIA Request"), at 5.[1] Plaintiff believes that the subsequent prosecution of Mr. Choi and his co-arrestees (the "Choi prosecution")[2] was unduly severe and reflects a pattern of DOJ intimidation of activists. See Am. Compl. ¶¶ 18–23. In his emails to USAO-DC, plaintiff sought information about why DOJ made the Choi prosecution "a priority," why DOJ officials did not address Mr. Choi by his military rank during the prosecution, and the cost of the prosecution of Mr. Choi. See Singh Decl., Ex. B, at 24.

On April 13, 2013, a USAO-DC official informed plaintiff by email that he needed to make a formal FOIA request to EOUSA in order to trigger a search for the records he sought. See Singh Decl., Ex. E, at 33. Consequently, plaintiff made an extensive FOIA request to EOUSA by letter dated April 30, 2013, requesting in pertinent part:

> 1. All records and information pertaining to the legal basis of prosecuting activists, who engage in protests . . . ;
>
> 2. All records and information created on or after Nov. 12, 2010, pertaining to the legal basis for the arrest and/or prosecution of Lt. Choi . . . ;
>
> 3. All records and information created on or after Nov. 12, 2010, pertaining to the legal basis for the Department of Justice or U.S. Attorney's Office to fail to refer to Lt. Choi by his military rank, in accordance with Army Regulation 670-1[;]
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> 4. The total cost of the prosecution of Lt. Choi . . . .

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[1] Because the Singh Declaration and exhibits were docketed into ECF as a single document without consecutive internal pagination, the Court refers here and in subsequent citations to the page numbers added by the ECF system.

[2] See United States v. Farrow *et al.*, 10-MJ-739-JMF-11 (D.D.C.).

4/30/13 FOIA Request at 7–8. Plaintiff asked for expedited processing of his request as a person "primarily engaged in disseminating information" within the meaning of the Act. 4/30/13 FOIA Request at 9 (citing, *inter alia*, 5 U.S.C. § 552(a)(6)(E)(v)(II)). Over the next several months, plaintiff communicated by telephone with EOUSA officials, but received no response to his FOIA request. See Am. Compl. ¶¶ 44–47. DOJ never gave written notice of "unusual circumstances" excusing its failure to respond, informing plaintiff only that it struggled with a high volume of FOIA requests. See id. (citing 5 U.S.C. § 552(a)(6)(B)).[3]

In November 2013, plaintiff retained Willkie Farr & Gallagher LLP ("Willkie Farr"). See id. ¶ 48; see also Singh Decl., Ex. G (the "12/6/13 FOIA Appeal"), at 38. On December 6, 2013, Willkie Farr filed a letter on plaintiff's behalf to appeal DOJ's constructive denial of the 4/30/13 FOIA request and to demand immediate disclosure of responsive information. See 12/6/13 FOIA Appeal at 38. The letter noted that both the twenty-day deadline for responding to a FOIA request, as well as the ten-day deadline for making a determination regarding expedited processing, were long past. See id. at 38–39 (citing 5 U.S.C. § 552(a)(6)).

On May 20, 2014, DOJ's Office of Information Policy ("OIP") responded to Willkie Farr by email, acknowledging receipt of the 12/6/13 FOIA Appeal and remanding plaintiff's request to EOUSA to search for responsive records. See Singh Decl., Ex. H, at 42. Nevertheless, nearly one year after making the 4/30/13 FOIA Request, plaintiff had yet to receive a response from any DOJ component. See Am. Compl. ¶ 53; see also Singh Decl.,

[3] Plaintiff also contacted the office of United States Representative Joseph Crowley, who sent a letter to EOUSA in February 2014 requesting that it answer plaintiff's FOIA request "at [its] earliest convenience." Letter from Louis Flores (Sept. 3, 2015), Ex. I, at 51, DE #12; see also Am. Compl. ¶ 49.

Ex. I (the "8/17/15 FOIA Resp."), at 45–46.

On May 5, 2015, plaintiff, proceeding *pro se*, filed the instant action requesting that the District Court order DOJ and its components to "immediately process [the 4/30/13 FOIA Request] and to release any responsive records not properly withholdable under FOIA . . . ." Complaint (May 5, 2015) ("Compl."), *ad damnum* clause ¶ A, DE #1. Plaintiff also sought costs and reasonable attorney's fees, as well an order enjoining DOJ and its components from charging fees for processing his request. See id., *ad damnum* clause ¶¶ B–C.[4] Defendant answered on July 1, 2015. See Answer (July 1, 2015), DE #9.

Finally, on August 17, 2015—more than two years after plaintiff filed the 4/30/13 FOIA request—DOJ provided a form response that a search of USAO-DC records had yielded no responsive documents. See 8/17/15 FOIA Resp. at 45–46. Nevertheless, DOJ made a "discretionary release[,]" at no cost to plaintiff, of 331 public records related to the Choi prosecution that were deemed "not responsive" to the 4/30/13 FOIA Request. Id.

After receiving the 8/17/15 FOIA Response, plaintiff submitted a letter to the Court expressing his intention to seek discovery in this case. See Letter from Louis Flores (Sept. 3, 2015) at 1, DE #12. Plaintiff claimed that the 8/17/15 FOIA Response was a "red herring, demonstrating a bad faith intention on the part of the DOJ to divert attention away from the true documents and records being sought under the FOIA Request[,]" which thus warranted discovery, see id. Defendant disputed plaintiff's characterization of DOJ's response and noted that "discovery is typically unavailable in FOIA actions, which ordinarily are resolved by way

[4] On May 8, 2015, plaintiff was granted leave to proceed *in forma pauperis* and was therefore not assessed a filing fee. See Order (May 8, 2015), DE #4.

of summary judgment motions." Letter in Response to Plaintiff's Sept. 3, 2015 Letter (Sept. 11, 2015) at 2, DE #13.

At an initial conference on September 16, 2015, plaintiff served defense counsel with a thirteen-page "Index of References to Records Requested under FOIA Request." See Singh Decl. ¶ 12 & Ex. J (the "9/16/15 Index"). Citing Carney v. U.S. Department of Justice, 19 F.3d 807 (2d Cir. 1994)), this Court denied plaintiff's request for discovery, but encouraged defendant to supplement its search of USAO-DC documents by voluntarily searching the files of DOJ's central offices and producing any written guidelines concerning the prosecution of activists. See Minute Order (Sept. 16, 2015) (the "9/16/15 Minute Order") at 1–2, DE #14. The Court also urged DOJ to consider voluntarily producing at least some documents listed in the 9/16/15 Index. See id. at 2. In addition, the Court granted plaintiff permission to amend or supplement his complaint, without prejudice to any defenses defendant might have. See id. at 1. Plaintiff filed his amended complaint on September 23, 2015, in which he added, among other things, an additional request for relief. Compare Compl. at 28, with Am. Compl. at 30. Plaintiff now asked the Court to

> appoint a monitor to conduct or verify the search for responsive records, order the conduct of in camera reviews of records, and/or impose sanctions and penalties, including fines, against the [d]efendant to compel compliance with FOIA and to deter each of future acts of bad faith and future violations of FOIA.

Am. Compl., *ad damnum* clause ¶ E.

The parties filed a mandatory joint status report on November 5, 2015, in which defendant asserted that "all non-exempt records responsive to [p]laintiff's FOIA request to EOUSA that is the subject of this action ha[d] been released to [p]laintiff." Status Report

(Nov. 5, 2015) (the "11/5/15 Status Report") at 3, DE #18. Defendant reported that it had voluntarily expanded its search to the files of the Office of the Assistant Attorney General of DOJ's Criminal Division in Washington, D.C. for written guidelines concerning the prosecution of activists, but had identified no responsive documents. See id. at 1–2. Defendant also advised that it had voluntarily searched for, collected, and provided to plaintiff certain publicly available documents from the Choi prosecution file, the United States Attorney Manual ("USAM"), and elsewhere, which plaintiff had referenced in the 9/16/15 Index. See id. at 1; see also Singh Decl., Ex. K, at 63–67. Plaintiff now contends that two of these documents, both email communications contained in the Choi prosecution file, are responsive to his request for guidelines concerning DOJ's prosecutions of activists and were wrongfully withheld by defendant. See Pl. SJ Mem. at 21–22.[5]

Plaintiff did not find DOJ's additional voluntary efforts sufficient. On November 5, 2015, he requested an eight-week extension of time to confer with defendant and "resolve numerous issues about the records being unjustly withheld by the DOJ, including a new FOIA [r]equest" dated October 20, 2015. 11/5/15 Status Report at 2; see also Singh Decl., Ex. M

[5] Specifically, plaintiff asserts that DOJ improperly withheld two email communications from the Choi prosecution file, the "Myers Memo" and the "Captain Guddemi Email." See Pl. SJ Mem. at 21–22; see also Declaration of Louis Flores (Jan. 5, 2016) (the "Flores Decl."), Ex. G, Tabs A & B, at 2–7, DE #26-8. The Myers Memo is an email from an official at the Solicitor's Office of the United States Department of the Interior to officials at the National Park Service ("NPS"), opining on the legality under NPS regulations of chaining oneself to the White House fence. See Flores Decl., Ex. G, Tab A, at 2–4. The Captain Guddemi Email comprises a series of email communications involving officials at NPS, the United States Secret Service, the United States Capitol Police, the United States Park Police ("USPP"), and DOJ. See id., Ex. G, Tab B, at 6–8. In the initial email, a Secret Service official notified other recipients that a group calling itself "Get Equal" was planning a demonstration "in front of the WH." Id. at 7. A USPP official forwarded the email to various NPS officials, one of whom forwarded the email to the AUSA assigned to the Choi prosecution. See id. at 6–7.

(the "10/20/15 FOIA Request"), at 82–90. Plaintiff also asked the Court, if his extension request were denied, to determine "DOJ's obligations to produce records missing from the DOJ's first discretionary release . . . ." 11/5/15 Status Report at 3. Defendant objected to plaintiff's attempts to "seek . . . discovery and to broaden the scope of this litigation," and urged that dispositive motion practice was now appropriate. Id. The Court agreed, as DOJ's voluntary production appeared to have expanded, rather than narrowed, the scope of plaintiff's demands. See Memorandum and Order (Nov. 9, 2015) (the "11/9/15 M&O") at 1–2, DE #19. The Court adopted the parties' proposed briefing schedule for dispositive motions. See id. at 2.

Defendant filed its motion for summary judgment on November 23, 2015, offering five bases to reject plaintiff's FOIA claims: First, DOJ contends that this action is moot because EOUSA has fully responded to the 4/30/13 FOIA Request. See Def. SJ Mem. at 4. Second, DOJ asserts that plaintiff cannot rebut the presumption that it has searched in good faith, nor show that its voluntary release of nonresponsive, public documents violates the Act. See id. Third, DOJ argues that plaintiff cannot broaden his FOIA request through litigation by seeking discovery and challenging DOJ's voluntary disclosures. See id. Fourth, DOJ avers that plaintiff cannot state a claim that DOJ has evinced a "pattern and practice" of delayed FOIA responses. See id. Fifth, DOJ contends that plaintiff's accusations of misrepresentations and bad faith lack merit, there is no basis to appoint a monitor, and sanctions are unavailable under FOIA. See id.

Attached to defendant's summary judgment motion were the declarations of two DOJ employees, Princina Stone and Karin Kelly, who helped prepare the response to the 4/30/13

FOIA Request.[6] Ms. Stone, an "Attorney-Advisor with [EOUSA's] Freedom of Information Act/Privacy Act ('FOIAPA') staff" since April 2015, "review[s] the adequacy of searches conducted in response to [FOIA] requests and . . . determinations made by EOUSA staff." Declaration of Princina Stone (Nov. 23, 2015) (the "Stone Decl.") ¶ 1, DE #20-5. On the basis of personal knowledge, Ms. Stone declared that, after plaintiff had filed this action, EOUSA obtained a copy of the 4/30/13 FOIA Request, and coordinated USAO-DC's "diligent" yet unsuccessful attempts to identify responsive records. See id. ¶¶ 3, 6. Ms. Stone also reported that USAO-DC had conducted a search for "public records related to Daniel Choi," from which EOUSA, "[a]s a courtesy," "compiled for discretionary release those documents . . . that related specifically to . . . Choi[,]" and released them to plaintiff. Id. ¶¶ 7–9.[7]

Ms. Kelly, "a Paralegal Specialist and [FOIA] Coordinator in the Civil Division of" USAO-DC, served as liaison to the FOIA/PA staff at EOUSA. See Declaration of Karin Kelly (Nov. 23, 2015) (the "Kelly Decl.") ¶ 1, DE #20-6. Ms. Kelly personally reviewed the 4/30/13 FOIA Request and commenced DOJ's search for responsive information at USAO-DC. See id. ¶¶ 2, 7. She contacted a USAO-DC information technology ("IT") specialist to search the Replicated Criminal Information System ("RCIS"), a case management database that

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[6] As detailed below, see *infra* pp. 14–16, defendant subsequently supplemented these submissions with a declaration by the Chief of USAO-DC's Civil Division. See generally Declaration of Daniel F. Van Horn (Aug. 24, 2016) ("Van Horn Decl."), DE # 41-1.

[7] Regarding EOUSA's failure to respond to the 4/30/13 FOIA Request until after the filing of this action, Ms. Stone declared that plaintiff's request "could not be located" in a search of EOUSA files, though "the log book that maintains lists of FOIA/PA requests received by EOUSA indicated that a FOIA request [had been] received." Stone Decl. ¶¶ 4–5.

contains "information related to, among other things, court cases, arrests, and witness data from cases originating in the Superior Court of the District of Columbia." Id. ¶ 10. The IT specialist replied that because RCIS does not categorize individuals as "activists," and "targeted" is not a defined term, no search could be performed using those terms. See id. ¶ 12.

Ms. Kelly then contacted another IT specialist at USAO-DC to search the Legal Information Network System ("LIONS"), another "case management system [that is] used by the Criminal, Appellate[,] and Civil Divisions of USAO-DC to track all activities taking place in [federal] district court matters, cases, and appeals." Id. ¶ 13. While noting that "'activist' is not a term that can be readily tracked in LIONS[,]" id. ¶ 14, the IT specialist nevertheless ran a search for that term, which produced no results, see id. ¶ 15. Echoing both IT specialists, the AUSA assigned to the Choi prosecution also advised Ms. Kelly that USAO-DC does not use the term "activist," see id. ¶ 16, or "specifically target anyone . . . for prosecution[,]" id. ¶ 17.

Ms. Kelly reported that DOJ was unable to develop searches for some of plaintiff's other requests and sub-requests. Due to the allegedly vague and broad nature of the question, Ms. Kelly could not formulate a search for information regarding "the limits of DOJ's prosecution to minimi[z]e the interference with First Amendment, other Constitutional rights, civil liberties, and civil rights of Lt. Choi." Id. ¶ 19. Nor could Ms. Kelly formulate a search for records responsive to plaintiff's request for information about DOJ's alleged failure to refer to Mr. Choi by military rank, because plaintiff's request appeared to be a question, not a request for searchable documents. See id. ¶ 20. Finally, Ms. Kelly declared that it is not

possible to ascertain the cost of prosecuting Mr. Choi individually, since "accounting records do not exist for a single defendant when there are multiple co-defendants . . . ." Id. ¶ 23; see also id. ¶¶ 21–22, 24.

On January 5, 2016, plaintiff filed his opposition to defendant's summary judgment motion, together with a cross-motion for partial summary judgment. See generally Pl. SJ Mot. He argues that defendant "fabricated the misplacement of" his 4/30/13 FOIA Request, and has "withheld records, redacted records without explanation, made misrepresentations, filed at least one altered or incomplete document into evidence, and withheld at least one *Vaughn* Index." Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment (Jan. 5, 2016) ("Pl. SJ Mem.") at 8, DE #24-1.[8] Plaintiff also argues that DOJ's 8/17/15 FOIA Response constitutes a *Glomar* (or "no number, no list") response, which he argues is unlawful. See id. at 11–15.[9]

Plaintiff seeks a variety of relief in his Cross-Motion for Partial Summary Judgment: He asks the Court to order defendant to produce all documents responsive to his 4/30/13 and 10/20/15 FOIA Requests or submit full and complete indices, including *Vaughn* indices, as appropriate. See Pl. SJ Mot. at 1. He asks the Court to determine DOJ's obligations with respect to publicly available documents responsive to his FOIA Requests, and to order DOJ to

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[8] A *Vaughn* index is an itemized explanation of an agency's reasons for withholding documents responsive to a FOIA request but subject to exemption from disclosure under the Act. See Vaughn v. Rosen, 484 F.2d 820, 827–28 (D.C. Cir. 1973). Because DOJ does not claim to have withheld responsive records here, no *Vaughn* index was required.

[9] A "*Glomar* response" means a "neither confirm nor deny" response. The name derives from the *Hughes Glomar Explorer*, the ship whose purported covert activities were the subject of a FOIA request in Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976).

provide all documents missing from EOUSA's response to the 4/30/13 FOIA Request. See id. at 1–2. He also asks the Court to order DOJ to "fully answer" a follow-up letter he wrote on October 26, 2015, as well as produce detailed declarations, from declarants with sufficient personal knowledge under Rule 56(c)(4) of the FRCP, concerning defendant's searches in response to the 4/30/13 FOIA Request, including a "line-item accounting." Id. at 2. Finally, plaintiff renews his request for discovery. See id.

In a separate cross-motion under Rule 52 of the FRCP, also filed January 5, 2016, plaintiff asks the Court to enjoin defendant's "unlawful attempts" to "impede" his FOIA Requests. Pl. R. 52 Mot. at 1. Repeating many arguments and requests for relief from his summary judgment brief, plaintiff also asks the Court to reconsider its denial of his request for discovery and its "finding" that he was "trying to expand this FOIA action[,]" and seeks the imposition of sanctions and penalties on DOJ. Memorandum in Support of Plaintiff's Cross Motion Under Rule 52 and Demand for Sanctions and Penalties (Jan. 5, 2016) ("Pl. R. 52 Mem.") at 8, DE #25-1.

On February 12, 2016, defendant filed its reply in support of summary judgment and its oppositions to plaintiff's cross-motions. See generally Memorandum of Law in Further Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Cross-Motion for Partial Summary Judgment (Feb. 12, 2016) ("Def. SJ Reply"), DE #27; Memorandum of Law in Opposition to Plaintiff's Cross-Motion Under Rule 52 and Demand for Sanctions and Penalties (Feb. 12, 2016) ("Def. R. 52 Opp'n"), DE #28. Plaintiff filed "surreplies" to those briefs on February 24, 2016. See generally Memorandum in Opposition re Motion for Summary Judgment Surreply (Feb. 24, 2016), DE #30; Memorandum in

Opposition re Notice of Motion for Sanctions under Rule 52 Surreply in Opposition to Defendant's Memorandum (Feb. 24, 2016), DE #31.

On May 27, 2016, the Honorable Joan M. Azrack, the district court judge assigned to this case, referred the cross-motions for summary judgment and plaintiff's Rule 52 Motion to the undersigned magistrate judge for a report and recommendation. See Electronic Order. The Court heard oral argument on the parties' respective cross-motions on July 11, 2016 (the "July 11 Hearing"). See generally Minute Order (July 11, 2016), DE #34; Transcript of Proceedings Held on July 11, 2016 (July 25, 2016) ("7/11/16 Tr."), DE #35.

At the July 11 Hearing, the Court asked plaintiff what additional records he was seeking and had not received. 7/11/16 Tr. 19:22–20:9. Plaintiff replied that he still sought "guidelines, procedures, policies, [and] protocols of how the government balances the rights of activists in cases where the Government brings criminal charges against activists for their activism." Id. at 20:12-16, 21:1-5. Plaintiff argued that these policies must exist, despite DOJ's denial, "because activists are being prosecuted[,]" and thus there must be "general guidelines for their prosecution . . . ." Id. at 24:16–25:5. In support of his assertions, he cited provisions of the USAM, though he later conceded that these provisions specifically address prosecutions relating to crimes against property owned by foreign governments, not the rights of protesters. See id. at 21:1–22:6, 31:7–32:9. Plaintiff also reiterated his demand for cost records relating to the Choi prosecution, stating that he would accept a record of all costs associated with the prosecution rather than those specific to Mr. Choi. Id. at 27:6-12. Addressing his Rule 52 Motion, plaintiff argued that defendant's bad faith is evident because "its posture regarding FOIA is that once an agency makes a response, that that delayed

response is not standing for a bad faith act[,]" and "because the Government refuses to comply with FOIA until a court enters an order." Id. at 28:16–29:6.

Also at the July 11 Hearing, defendant provided additional information concerning its searches in response to the 4/30/13 FOIA Request—information not included in either the Kelly or Stone Declarations. See Order (Aug. 8, 2016) (the "8/8/16 Order") at 1 –2, DE #37. DOJ's counsel clarified that the RCIS and LIONS systems are "database tracking systems" for USAO-DC prosecutions in state and federal court, "not comprehensive databases of all the information in those cases and investigations[,]" and thus probably do not contain the underlying documents used in those prosecutions. 7/11/16 Tr. 8:1–9:3. Counsel also reported that, in addition to RCIS and LIONS, USAO-DC staff had searched the entire Choi prosecution file for responsive documents. See id. at 9:18–10:8, 12:23–13:7.

Following the July 11 Hearing, the Court directed defendant to provide supplemental submissions that contained evidentiary support for defendant's descriptions of (1) the RCIS and LIONS databases and (2) its search of the Choi prosecution file. 8/8/2016 Order at 1–2. The Court also "encouraged," but did not order, defendant to "further search . . . the [RCIS and LIONS] databases, using the term 'demonstration' and variants thereof." Id. at 2 n.1.

In response to the 8/8/16 Order, defendant submitted the Van Horn Declaration on August 24, 2016. See Letter Pursuant to the Court's August 8, 2016 Order, DE #41; Van Horn Decl. Mr. Van Horn has been an Assistant United States Attorney ("AUSA") in the District of Columbia since 1992 and has served as Chief of USAO-DC's Civil Division since 2012. See Van Horn Decl. ¶ 1. In his declaration, AUSA Van Horn first addressed the RCIS and LIONS databases, describing them as "electronic case management system[s] . . . used to

store [District of Columbia] Superior Court criminal case and arrest-related information[,]" in the case of RCIS, and "factual information about criminal, civil, and appellate cases and matters" in all other courts, in the case of LIONS. Id. ¶¶ 4, 5. "Neither RCIS nor LIONS contains the underlying files for a case or matter," AUSA Van Horn noted, "but they can be used to identify where those files may be located." Id. ¶ 6. AUSA Van Horn also recounted how, at the Court's suggestion, USAO-DC IT specialists conducted additional searches of RCIS and LIONS using the following search terms related to "activists" and "protests": "demonstration, demonstrations, protest, protests, rally, rallies, march, marches, picket, pickets, rebel, rebels, and mutiny." Id. ¶ 9. These searches yielded no responsive documents. See id.

AUSA Van Horn also described his personal search of the Choi prosecution file for policies responsive to the 4/30/13 FOIA Request, see id. ¶ 11, as well as inquiries he made of both the AUSA who prosecuted the case against Mr. Choi, and the Chiefs of USAO-DC's Appellate, Criminal, Special Proceedings, and Superior Court Divisions, concerning the existence of any such policies, see id. ¶¶ 12–14. Though none of these efforts yielded responsive guidelines or policies, AUSA Van Horn did identify and provide to plaintiff correspondence in the Choi prosecution file between DOJ and Congressman Mark Pocan, in which a DOJ representative "assured" the Congressman "that [DOJ] is committed to protecting the civil rights of all Americans, including lesbian, gay, bi-sexual and transgendered individuals, and that [DOJ] does not seek to prosecute any individuals for engaging in lawful protests." Id. ¶ 11.

On the basis of these searches and his own experience working with USAO-DC, AUSA

Van Horn concluded "without reservation that there are no USAO-DC records, either in electronic or hard copy format, of guidelines, policies, procedures, and/or protocols concerning how the USAO-DC balances the First Amendment rights of activists when making charging decisions or undertaking prosecutions of activists arising from their participation in protests or demonstrations which involve acts of civil disobedience or violations of criminal laws." Id. ¶ 14. Rather, AUSA Van Horn asserted that "[w]hen First Amendment issues are presented in cases handled by the USAO-DC, those issues are addressed by applying applicable legal princip[le]s to the specific facts presented in the particular case or matter, not by application of a rigid, pre-determined policy." Id.

Plaintiff believes the Van Horn Declaration to be inadequate and a product of bad faith. See generally Plaintiff's Response to Declaration of Van Horn and Request for Entry of Judgment Pursuant to Rules 56 and 58 ("Pl. Opp'n Van Horn Decl.") (Sept. 2, 2016), DE #43. He asserts, among other things, that AUSA Van Horn failed to search appropriate databases, relied on impermissible hearsay, and did not address responsive records. See id. at 2–8. He also claims that DOJ's production of its correspondence with Congress Pocan proves that defendant has withheld records responsive to the 4/30/13 FOIA Request. See id. at 5. Plaintiff maintains that DOJ possesses, and has failed to disclose, additional guidelines for the prosecution of individuals participating in demonstrations. See id.

## DISCUSSION

### A. The Cross-Motions for Summary Judgment

#### 1. Legal Standard: FOIA

"The basic purpose of FOIA is to ensure an informed citizenry . . . needed to check

against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). The Act provides that "any member of the public is entitled to have access to any record maintained by a federal agency, unless that record is exempt from disclosure under one of the Act's nine exemptions." Dennis v. Alcohol, Tobacco, Firearms & Explosives, Nos. 12-CV-3795 (JG), 12-CV-456- (JG), 2013 WL 6579581, at *3 (E.D.N.Y. Dec. 13, 2013) (quoting A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 143 (2d Cir. 1994)).

District courts have "[subject matter] jurisdiction [under FOIA] to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B); see also Dennis, 2013 WL 6579581, at *3 (citing, *inter alia*, U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989)). Jurisdiction lies only where an agency has (1) improperly (2) withheld (3) agency records. See Oslzly v. Mendlewicz, 15 Civ. 5681 (BMC) (LB), 2015 WL 7575902, at *3 (E.D.N.Y. Nov. 25, 2015) (quoting Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980) (internal quotation marks omitted)). Accordingly, a FOIA action becomes moot if the agency responds, even belatedly, to a request, see, e.g., Muset v. Ishimaru, 783 F.Supp.2d 360, 372 (E.D.N.Y. 2011), or if no responsive records exist, see Haji v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 03 Civ. 8479(DC), 2004 WL 1783625, at *2 (S.D.N.Y. Aug. 10, 2004).

**2. Legal Standard: Summary Judgment**

FOIA disputes are typically resolved by summary judgment. See Conti v. United States Dep't of Homeland Sec., No. 12 Civ. 5827(AT), 2014 WL 1274517, at *10 (S.D.N.Y. Mar.

24, 2014). When considering summary judgment motions, a court's duty is not to try issues of fact, but rather to "determine whether there *are* issues of fact to be tried." Sutera v. Schering Corp., 73 F.3d 13, 15–16 (2d Cir. 1995). The movant must show that there is no genuine dispute of material fact and that it is entitled to judgment as a matter of law, see, e.g., Jeffreys v. The City of New York, 426 F.3d 549, 553 (2d Cir. 2005), and the court must resolve all ambiguities and draw all permissible factual inferences in favor of the nonmoving party. See, e.g., Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc., 391 F.3d 77, 83 (2d Cir. 2004). If the movant makes its initial showing, the burden shifts to the nonmovant to establish the existence of genuine material fact disputes. See George v. Reisdorf Bros., Inc., 410 F. App'x 382, 383–84 (2d Cir. 2011). In doing so, the nonmovant must sufficiently "establish the existence of [each] element essential to that party's case, . . . since a complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). "[C]onclusory allegations" or "unsubstantiated speculation" are insufficient to defeat summary judgment, Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998), as is "merely colorable" or "not significantly probative" evidence, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249–50 (1986).

Specific to the FOIA context, to prevail on a motion for summary judgment, the defending agency must show that "its search was adequate and that any withheld documents fall within an exemption . . . ." Davis v. U.S. Dep't of Homeland Sec., No. 11–CV–203 (ARR)(VMS), 2013 WL 3288418, at *6 (E.D.N.Y. June 27, 2013) (quoting Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994)); see also 5 U.S.C. § 552(a)(4)(B). When a complainant alleges that the agency "has improperly withheld documents through its failure to

locate them," the agency must show that "it conducted an adequate search that failed to produce the requested records." Dennis, 2013 WL 6579581, at *3. The agency can sustain its summary judgment burden with "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search . . . ." Carney, 19 F.3d at 812. "The affidavits should identify the searched files and describe at least the general structure of the agency's file system which renders any further search unlikely to disclose additional relevant information." Davis, 2013 WL 3288418, at *6 (quoting Katzman v. CIA, 903 F.Supp. 434, 438 (E.D.N.Y. 1995) (internal formatting omitted)). "[E]xtraordinary measures" are not required, only "a search reasonably designed to identify and locate responsive documents." Garcia, 181 F.Supp.2d at 368 (internal quotation marks omitted); see also Meeropol v. Meese, 790 F.2d 942, 956 (D.C. Cir. 1986) ("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.").

Under this "adequacy" standard, requesters may not "reduce government agencies to full-time investigators on [their] behalf . . . ." Judicial Watch, Inc. v. Dep't of State ("Judicial Watch II"), No. 15-CV-690 (RMC), -- F.Supp.3d --, 2016 WL 1367731, at *4 (D.D.C. Apr. 6, 2016). Even a "disjointed" search, made in response to a requester's "prodd[ing]" during litigation, can suffice. Aland v. U.S. Dep't of the Interior, No. 13 C 3547, 2014 WL 4680747, at *1–3 (N.D. Ill. Sept. 19, 2014). Agencies have no obligation, for example, to "search every record system[,]" Judicial Watch II, 2016 WL 1367731, at *2, or use "all possible variants of a particular name or [search] term[,]" Conti, 2014 WL 1274517, at *15; see also Judicial Watch II, 2016 WL 1367731, at *5. Rather, agencies may focus on those systems in which they believe responsive documents are likely to be located, Oglesby v. Dep't

of Army, 920 F.2d 57, 68 (D.C. Cir. 1990), as "[a]gencies are not required to maintain their records or perform searches which are not compatible with their own document retrieval systems[,]" Thomas v. Comptroller of the Currency, 684 F.Supp.2d 29, 33 (D.D.C. 2010) (citation omitted). Nor need agencies "create a document in response to a request," Amnesty Int'l USA v. CIA, No. 07 Civ. 5435(LAP), 2008 WL 2519908, at *12 (S.D.N.Y. June 19, 2008) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161–62 (1975)), or "answer questions disguised as a FOIA request," id.

Furthermore, "[a]n agency is not obliged to look beyond the four corners of the [FOIA] request for leads to the location of responsive documents[,]" Judicial Watch II, 2016 WL 1367731, at *3, and "no statute requires a court to allow FOIA modifications during the course of litigation[,]" Vietnam Veterans of Am. Conn. Greater Hartford Chapter 120, 8 F.Supp.3d 188, 203 (D. Conn. 2014) (citation omitted). Accordingly, courts need address only those requests that actually appear in the FOIA request at issue, not modified requests crafted during litigation. See id. For instance, where a request sought documents concerning so-called "ghost detainees," without specifying names of specific detainees, responding agencies had no obligation to compile a list of potentially relevant detainees or search databases using names provided by the requester during litigation. See Amnesty Int'l, 2008 WL 2519908, at *13.

Once an agency establishes that its search was adequate, then "to justify discovery the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations." Dennis, 2013 WL 6579581, at *4 (quoting Carney, 19 F.3d at 812 (ellipsis omitted)). This burden "is high[,] as an agency's affidavits and declarations . . . are accorded a presumption of good faith[,]" id. (internal quotation marks

omitted), which "cannot be rebutted by purely speculative claims about the existence and discoverability of other documents[,]" Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) (internal quotation marks omitted), or about "the motivations of the people performing the searches[,]" Conti, 2014 WL 1274517, at *14; accord Aland, 2014 WL 4680747, at *2 (finding no bad faith where FOIA requester failed to support allegations that defendants had intentionally provided nonresponsive documents and that additional responsive records existed). Mere delay in responding to a request is not evidence of bad faith, see Amnesty Int'l, 2008 WL 2519908, at *9 (citing Meeropol, 790 F. 2d at 952), and additional document releases, "accomplished as a result of working with the requester[,]" even during litigation, "suggest a 'stronger, rather than a weaker, basis' for accepting the integrity of the search." Conti, 2014 WL 1274517, at *15 (quoting Meeropol, 790 F.2d at 953).

**3. DOJ's Response to Plaintiff's 4/30/13 FOIA Request**

After more than two years and the initiation of this protracted litigation, defendant at long last responded to the 4/30/13 FOIA Request, contending that no responsive records exist. See generally 8/17/15 FOIA Resp.[10] Plaintiff is understandably upset that defendant failed to respond within a time frame even approximating that prescribed by statute, see Pl. SJ Mem. at 1–4, and DOJ has not justified this delay by showing—or even claiming—"exceptional circumstances" and the exercise of due diligence in responding to the request. See 5 U.S.C.

[10] Contrary to plaintiff's assertions, see, e.g., Pl. SJ Mem. at 11–15, this response—an outright denial that responsive records could be found—is neither a *Glomar* nor "no number, no list" response. See Wilner v. NSA, 592 F.3d 60, 67 (2d Cir. 2009) (defining *Glomar* response as "refus[al] to confirm or deny the existence of certain records"); N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100, 105 (2d Cir. 2014) ("A no number, no list response *acknowledges the existence of documents responsive to the request*, but neither numbers nor identifies them by title or description." (emphasis added)).

§ 552(a)(6)(C)(i). Nevertheless, so long as DOJ arrived at its belated determination after an adequate search, and did not act in bad faith, it is entitled to summary judgment under FOIA. See Garcia v. U.S. Dep't of Justice, Office of Info. & Privacy, 181 F.Supp.2d 356, 366 (S.D.N.Y. 2002). Put simply, the only relief FOIA makes available to plaintiff is an order directing DOJ to release responsive records that were improperly withheld; if none exist, plaintiff has no claim. See 5 U.S.C. § 552(a)(4)(B); see also Muset, 783 F.Supp.2d at 372 (finding FOIA claim moot on receipt of requested documents despite agency's ten-month delay in responding); DiModica v. U.S. Dep't of Justice, No. 05 Civ. 2165(GEL)(FM), 2006 WL 89947, at *3 (S.D.N.Y. Jan. 11, 2006) (Lynch, J.) (ruling that FOIA claim was rendered moot when, on November 30, 2005, DOJ produced documents responsive to FOIA request sent on July 2, 2004).

**a. Adequacy of Defendant's Searches**

The 4/30/13 FOIA Request[11] calls for three general categories of documents: "[a]ll records and information pertaining to the legal basis [for] prosecuting activists," including Mr. Choi, "who engage in protests[;]" records pertaining to DOJ's alleged failure to refer to Mr. Choi by his military rank during the prosecution; and records pertaining to the costs of the prosecution of Mr. Choi. 4/30/13 FOIA Request at 7–8. Mr. Choi is the only individual named in the operative language of the Request.[12] See id. In support of its motion for

[11] Plaintiff's 10/20/15 FOIA Request is not the subject of this action, and plaintiff may not broaden the scope of his litigation by filing new FOIA requests *seriatim*. See 11/9/15 M&O at 2; see also Biberman v. FBI, 528 F.Supp. 1140, 1144 (S.D.N.Y. 1982) ("[L]itigation [is not] a vehicle for endless additional FOIA requests . . . .").

[12] Though plaintiff later provided defendant with the names of additional activists whose prosecutions he believes to be relevant to the 4/30/13 FOIA Request, see Pl. SJ Mem. at 5; Pl.

summary judgment, DOJ offers the Stone, Kelly, and Van Horn Declarations, which, based on each declarant's personal knowledge of DOJ's response to the 4/30/13 FOIA Request, Stone Decl. ¶ 3; Kelly Decl. ¶ 2; Van Horn Decl. ¶¶ 1, 14, "identify the searched files and describe at least generally the structure of the agency's file system which renders any further search unlikely to disclose additional relevant information[,]" see Dennis, 2013 WL 6579581, at *5 (citation omitted).[13]

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R. 52 Mem. at 37, defendant had no obligation to look beyond the four corners of the Request or to conduct searches based on plaintiff's subsequent efforts to clarify the Request. See Judicial Watch II, 2016 WL 1367731, at *3; Vietnam Veterans, 8 F.Supp.3d at 203–04; Amnesty Int'l, 2008 WL 2519908, at *13 (holding that agencies need not search for names that "were not actually mentioned in the [FOIA] Request[,]" but rather "were mentioned in materials cited in a footnote of the Request").

[13] Plaintiff argues that Ms. Kelly and Ms. Stone were not senior-level DOJ employees, which—in his view—makes their declarations less reliable. See Pl. SJ Mem. at 26–27. But defendant has supplemented those declarations by one from a senior-level DOJ employee, the Chief of USAO-DC's Civil Division. See generally Van Horn Decl. In any event, it is not the declarant's seniority (or lack thereof) that matters on a summary judgment motion under FOIA, but her familiarity with the search conducted. See, e.g., Serv. Women's Action Network v. Dep't of Defense, 888 F.Supp.2d 231, 240–41 (D. Conn. 2012) (listing requirements for FOIA affidavits as "relatively detailed and nonclusory" assertions that are "submitted in good faith" (citing, *inter alia*, Wood v. FBI, 432 F.3d 78, 85 (2d Cir. 2005)). Even then, "an affidavit from the agency employee who actually conducted the search in a FOIA case is not required to support summary judgment; an affidavit from a supervisor responsible for the search is sufficient." Davis, 2013 WL 3288418, at *12 (citing Carney, 19 F.3d at 814).

Plaintiff also argues that the Van Horn Declaration is insufficient because it contains hearsay, see Pl. Opp'n Van Horn Decl. at 4–5, 9, but, even if he were correct that the Van Horn Declaration relies on hearsay, FOIA does not require agency declarations to be based solely on the declarant's personal knowledge, see, e.g., Serv. Women's, 888 F.Supp.2d at 251 (accepting as sufficient affidavit from declarant who did not "seem to have actually supervised the search, but seems to have been an attenuated supervisor of a person who did[,]" where the affidavit nevertheless "provide[d] a thorough description of the search and of the reasons why certain actions were taken"); Barnard v. Dep't of Homeland Sec., 598 F.Supp.2d 1, 19 (D.D.C. 2009) ("FOIA declarants may include statements in their declarations based on information they have obtained in the course of their official duties.").

As described in those declarations, defendant searched databases containing factual information about USAO-DC criminal and civil cases in the District of Columbia local and federal courts, using as search terms multiple variations of "activist," "protest," and "demonstration." See Kelly Decl. ¶¶ 13–15; Van Horn Decl. ¶ 9. Defendant also searched the Choi prosecution file, see Van Horn Decl. ¶ 11, and consulted with the AUSA in charge of the Choi prosecution, as well as the "senior leadership of USAO-DC's litigating components[,]" about the existence of responsive documents. Van Horn Decl. ¶¶ 12–13; see also Kelly Decl. ¶¶ 16–18. Additionally, defendant conducted a voluntary search of the Office of the Assistant Attorney General ("OAAG") for the Criminal Division for any written guidelines regarding the prosecution of activists, see Def. SJ Mem. at 9; Defendant's Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 (Nov. 23, 2015) ¶¶ 79, 81, DE #20-3, and consulted a USAO-DC Budget Officer concerning cost records associated with Mr. Choi's prosecution,[14] see Kelly Decl. ¶¶ 21–23.

Defendant's searches yielded no responsive records, and the Stone, Kelly, and Van Horn Declarations all state that additional searches are unlikely to yield any. See Stone Decl. ¶ 6; Kelly Decl. ¶¶ 8–9; Van Horn Decl. ¶ 14. Plaintiff asserts numerous deficiencies with defendant's search procedures and claims that responsive records must exist. See generally Pl. SJ Mem.; Pl. R. 52 Mem. The Court concludes, as discussed below, that defendant's searches

[14] Regarding plaintiff's request for "the legal basis for [DOJ] or [USAO-DC] to fail to refer to Lt. Choi by his military rank, in accordance with Army Regulation 670-1[,]" 4/30/13 FOIA Request at 8, defendant did not perform a search, as it believed plaintiff to be asking a question rather than seeking documents, see Kelly Decl. ¶ 20; see also Scaff-Martinez v. Drug Enforcement Admin., 770 F.Supp.2d 17, 22–23 (D.D.C. 2011) (holding that FOIA does not obligate agencies to answer questions in the guise of records requests).

were adequate, and that plaintiff demands more of DOJ than FOIA requires.

***Policies and Guidelines Concerning Prosecutions of Activists and Mr. Choi:*** DOJ performed an adequate search in response to plaintiff's request for "[a]ll records and information pertaining to the legal basis [for] prosecuting activists . . . who engage in protests[,]" including Mr. Choi. 4/30/13 FOIA Request at 7–8. In plaintiff's words, these requests call for "guidelines, procedures, policies, [and] protocols of how the government balances the rights of activists [when] the Government brings criminal charges against activists for their activism." 7/11/16 Tr. 20:12-16; see also id. 21:1–8. In response, defendant has searched USAO-DC's litigation databases using variants of terms that appear in the 4/30/13 FOIA Request; reviewed the entire Choi prosecution file; consulted with USAO-DC's litigation heads; and voluntarily combed the files of the OAAG for the Criminal Division. See *supra* p. 24. In the FOIA context, where "adequacy" is the watchword, the Court has little trouble deeming these efforts sufficient. See, e.g., Meeropol, 790 F.2d at 956; Garcia, 181 F.Supp.2d at 368.

Plaintiff advances a number of arguments, none persuasive, against the adequacy of DOJ's searches. He claims that defendant used "limited" search terms, Pl. SJ Mem. at 25, and should have asked him for alternative search strings to run, see id. at 29. Even if plaintiff were correct that defendant's initial search terms were incomplete, see Kelly Decl. ¶¶ 13–15 (describing database searches using only "activist" and "targeted"), defendant eventually used expanded terms, which also returned no responsive records, see Van Horn Decl. ¶ 9. In any event, defendant had no obligation to use every possible search term, see Conti, 2014 WL 1274517, at *15 ("[A]n agency is not required to search for all possible variants of a particular

name or term."); Judicial Watch II, 2016 WL 1367731, at *5 (permitting agency to use different search terms for different databases), or to consult plaintiff for additional search terms, Amnesty Int'l, 2008 WL 2519908, at *13.

Plaintiff similarly asserts, on the basis of "information obtained by [his] online news publication . . . ," that defendant should have searched additional databases allegedly used by USAO-DC, Pl. Opp'n Van Horn Decl. at 2–3, but this too is not a FOIA requirement, see Judicial Watch II, 2016 WL 1367731, at *2 ("There is no requirement that an agency search every record system . . . ."). Plaintiff also claims that defendant must provide an "item-by-item clarification" of its searches for and responses to each separate sub-item of the 4/30/13 FOIA Request, see Pl. SJ Mem. at 26, but he again overestimates FOIA's reach, as defendant does not claim to have withheld responsive records pursuant to the Act's exemptions, see 5 U.S.C. § 552(a)(6)(A)(I) (stating that agencies need only notify FOIA requesters of the agency's determination and the reasons therefor); N.Y. Times Co. v. U.S. Dep't of Justice, 758 F.3d 436, 439 (2d Cir. 2014) ("A so-called 'classical' *Vaughn* index . . . lists titles and descriptions of documents with cites *to claimed FOIA exemptions* for each document listed.").[15]

As additional evidence of inadequacy, plaintiff also points to supposedly responsive records that were either belatedly produced or not produced following defendant's search.

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[15] Plaintiff also complains that defendant has provided no declaration describing its searches of "Main Justice," *i.e.*, the OAAG of the Criminal Division. See Pl. SJ Mem. at 27. But plaintiff has conceded that the 4/30/13 FOIA Request was directed only to USAO-DC—not to "Main Justice" or the OAAG for the Criminal Division, see 7/11/16 Tr. 42:6-14—and defendant has no obligation under FOIA to account for its *voluntary* production of nonresponsive documents, see, e.g., Competitive Enter. Inst. v. U.S. Envtl. Prot. Agency, 12 F.Supp.3d 100, 114 (D.D.C. 2014) ("Documents that are 'non-responsive' to a FOIA request . . . are simply not subject to the statute's disclosure requirements . . . .").

See, e.g., Pl. SJ Mem. at 7, 15–16, 21. As a preliminary matter, such arguments are, at best, generally unavailing under FOIA. See Serv. Women's, 888 F.Supp.2d at 247–48 ("[T]he unearthing of [additional] responsive records is not dispositive [with respect to the adequacy of a FOIA search], as the issue is not whether any additional responsive documents might conceivably exist, but rather whether the original search was reasonably designed to discover responsive documents."); see also Conti, 2014 WL 1274517, at *15 ("[T]he Court declines to find DHS' search inadequate simply because DHS conducted supplemental searches which resulted in the release of previously unreleased documents.").

In any event, nothing beyond mere speculation undergirds plaintiff's assertions. See Grand Cent. P'ship, 166 F.3d at 489–90; Aland, 2014 WL 4680747, at *2–3. Plaintiff has flatly claimed, for example, that passing remarks by the President and a former United States Attorney General in response to protests in Ferguson, Missouri prove that DOJ possesses policy guidelines for the prosecution of activists, see Pl. SJ Mem. at 18; 7/11/16 Tr. 39:23–40:6, 41:19-23, and that policies must exist because of the mere fact that activists are at times prosecuted for their conduct during protests, see 7/11/16 Tr. 24:16–25:5. Plaintiff similarly claims that DOJ has conceded the existence of responsive policies in certain passages from the USAM. See Pl. SJ. Mem. at 11, 16. As the Court previously noted, however, these passages are simply not responsive to the 4/30/13 FOIA Request, as they concern neither the prosecution nor First Amendment rights of protestors, but rather reference violations of a specific federal statute that addresses the "[p]rotection of property occupied by foreign

governments."[16] 7/11/16 Tr. 21:1–22:6 (discussing 18 U.S.C. § 970); see also Def. SJ Reply at 9. Plaintiff acknowledged as much at the July 11 Hearing. See 7/11/16 Tr. 22:1–22:6, 31:12–33:10. The same is true of other supposedly responsive documents identified by plaintiff, see, e.g., Pl. SJ Mem. at 21–22, 31–32; Pl. Opp'n Van Horn Decl. at 5–6, 8, none of which contains policy guidelines concerning the prosecution of activists, and all of which have now been produced to plaintiff in any case, see Conti, 2014 WL 1274517, at *15.[17]

***Legal Basis for DOJ's Alleged Failure to Refer to Mr. Choi by Rank:*** Defendant has also conducted an adequate search for records and information pertaining to DOJ's and USAO-

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[16] Even generously construing the USAM guidelines as responsive to plaintiff's request for records related to the prosecution of "activists," the USAM is a publicly available document, see Def. SJ Reply at 9–10, and need not be produced in response to FOIA requests, see 5 U.S.C. §§ 552(a)(2)(C) & (a)(3)(A).

[17] Specifically, plaintiff contends that the Myers Memo and Captain Guddemi Email, discussed *supra* p. 7 n.5, are "case-specific documents [that] reveal[] interpretations of the laws [that] the DOJ uses to prosecute activists[,]" Pl. SJ Mem. at 21, and are thus responsive to his request for "guidelines, procedures, policies, [and] protocols of how the government balances the rights of activists [when] the Government brings criminal charges against activists for their activism[,]" 7/11/16 Tr. 20:12-16; see also id. at 21:1–8. Apparently recognizing that the Myers Memo and Captain Guddemi Email are not responsive to the 4/30/13 FOIA Request—in that they do not discuss "balanc[ing] the rights of activists[,]" 7/11/16 Tr. 20:12-16—plaintiff requests, "in the alternative of providing general guidelines, which, as the DOJ claims, may not exist," that defendant "should produce the equivalent of the [Myers Memo] and [Captain Guddemi Email] for all of the activists that [p]laintiff has identified in the record of the proceedings before this Court . . . ." Pl. SJ Mem. at 21. Plaintiff cannot sustain his burden through speculation that additional, similar documents exist, see, e.g., Aland, 2014 WL 4680747, at *3, nor may he expand his 4/30/13 FOIA Request and his Amended Complaint to encompass an entirely new category of documents, see, e.g., Liberty Global Logistics LLC v. U.S. Maritime Admin., No. 13-cv-0399 (ENV)(JMA), 2014 WL 4388587, at *9 (E.D.N.Y. Sept. 5, 2014) (rejecting plaintiff's challenge to withholding of documents falling outside the scope of the amended complaint: "With respect to the grievances actually alleged in the amended complaint, those grievances are moot and the claim is dismissed."). This same analysis applies to DOJ's correspondence with Congressman Pocan. See Pl. Opp'n Van Horn Decl. at 5.

DC's alleged failure to refer to Mr. Choi by his military rank during the Choi prosecution. See 4/30/13 FOIA Request at 8. The Court agrees with defendant that this inquiry is a question, not a request for documents cognizable under FOIA. See Kelly Decl. ¶ 20; see also Scaff-Martinez, 770 F.Supp.2d at 22–23. But even if plaintiff had made a valid request for documents, defendant has reviewed the entire Choi prosecution file and identified no responsive records. See Van Horn Decl. ¶ 11. Plaintiff fails to articulate any basis to assume that broader search efforts would yield responsive documents, save for his claim that a handbook for *pro se* parties litigating in the Southern District of New York contains guidelines for *pro se* parties to use courtesy titles during court proceedings, and thus such guidelines must exist for DOJ as well. See 7/11/16 Tr. 27:14–28:5; Pl. SJ Mem. at 29. Even if plaintiff were correct that a responsive document might conceivably exist, his argument fails as a matter of law for the reasons described *supra* pp. 26–28 (citing Serv. Women's, 888 F.Supp.2d at 247–48; Conti, 2014 WL 1274517, at *15). Finally, if any such guidelines are, like the USAM, publicly available, DOJ need not produce them in response to FOIA requests. See 5 U.S.C. §§ 552 (a)(2)(C) & (a)(3)(A).

***Costs of Choi Prosecution:*** Defendant's search and response to plaintiff's request for the "total cost of the prosecution of Lt. Choi[,]" 4/30/13 FOIA Request at 8, presents a closer call, but the Court nevertheless concludes that DOJ has met its obligations under FOIA. After inquiring with a Budget Officer at USAO-DC, Ms. Kelly reported that accounting records did not exist for a single defendant in a multiple-defendant prosecution like the Choi prosecution, and that it would be impossible to compile cost records specific to Mr. Choi. See Kelly Decl. ¶¶ 21–24. Defendant thus informed plaintiff that no responsive records exist. See 8/17/16

FOIA Response. Plaintiff now contends that he is entitled to cost records for the entire Choi prosecution, see Pl. SJ Mem. at 26, but, as noted earlier, FOIA imposes no obligation on DOJ to look beyond the four corners of plaintiff's request, Judicial Watch II, 2016 WL 1367731, at *3, or to respond to modified requests made during litigation, Vietnam Veterans, 8 F.Supp.3d at 203. Plaintiff asked for the costs of the prosecution of Mr. Choi, not Mr. Choi's co-arrestees, and no records exist that isolate the costs of Mr. Choi's individual prosecution. If plaintiff now seeks a broader set of documents, he can make another FOIA request, but that is of no moment here. See Biberman, 528 F.Supp. at 1144.

**b. Bad Faith**

Because defendant has submitted declarations sufficient to establish a presumption that DOJ conducted an adequate search for records, the burden shifts to plaintiff to "make a showing of bad faith on the part of the agency sufficient to impugn [those] declarations[,]" which are accorded a presumption of good faith. Dennis, 2013 WL 6579581, at *4. Plaintiff has not met this high burden.

Plaintiff has asserted that defendant's bad faith is evident because "its posture regarding FOIA is that once an agency makes a response, that delayed response is not standing for a bad faith act[,]" and "because the [g]overnment refuses to comply with FOIA until a court enters an order." 7/11/16 Tr. 28:16–29:6. But it is settled law that delayed responses to FOIA requests do not, without more, establish bad faith, see Amnesty Int'l, 2008 WL 2519908, at *9 (citing Meeropol, 790 F.2d at 952), and plaintiff's allegations are otherwise precisely the kind of speculative claims about "the motivations of the people performing [FOIA] searches" that

cannot sustain his burden under the Act, Conti, 2014 WL 1274517, at *14.[18]

More specifically, plaintiff claims that defendant "has fabricated the misplacement of the [4/30/13 FOIA Request] file[,]" "withheld records, redacted records without explanation, made misrepresentations, filed at least one altered or incomplete document into evidence, and withheld at least one *Vaughn* Index." Pl. SJ Mem. at 8; see also generally Pl. R. 52 Mem. Many of these assertions overlap with his claims that defendant failed to perform adequate searches, and they are no less speculative than his broad claims of agency bad faith. For example, plaintiff makes no showing—other than his own assumptions, see, e.g., Pl. SJ Mem. at 4, 8—"that the [g]overnment's initial inability to locate documents was the result of bad faith as opposed to mere administrative error[,]" Garcia, 181 F.Supp.2d at 367. Likewise, his assertion that defendant withheld responsive records is premised on the same speculative claims about nonresponsive, voluntary releases by DOJ described *supra* pp. 26–28. See also Aland, 2014 WL 4680747, at *3 (rejecting plaintiff's assumption, based on one letter from state governor to U.S. Secretary of the Interior, that additional, similar high-level communications must exist). Defendant has never been under an obligation to produce a *Vaughn* index in this litigation. See *supra* pp. 11 n.8. Plaintiff's claims of misrepresentations and alteration of evidence are, at best, contrived and speculative. Compare Pl. R. 52 Mem.

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[18] Equally unavailing are plaintiff's attempts to convert conspiracy-minded assertions into a claim that DOJ has engaged in a "pattern and a practice" of failing to respond to FOIA requests. See, e.g., Pl. R. 52 Mem. at 10. The Second Circuit has yet to recognize such a cause of action under FOIA, see Pietrangelo v. U.S. Army, 334 F.App'x 358, 360 (2d Cir. 2009), and in any case plaintiff has at most shown an isolated (though lamentable) delay in responding to a single FOIA request, not the systemic showing required by courts that recognize "pattern and practice" claims under the Act, see, e.g., Pub. Emps. for Envtl. Responsibility v. U.S. Dep't of the Interior, Civil Action No. 06-182 (CKK), 2006 WL 3422484, at *9 (D.D.C. Nov. 28, 2006).

with Def. R. 52 Opp'n at 11–16; see also Conti, 2014 WL 1274517, at *14; Aland, 2014 WL 4680747, at *2.

Not only has plaintiff failed to demonstrate that defendant acted in bad faith, but affirmative evidence of good faith is present here in DOJ's voluntary disclosures. See Conti, 2014 WL 1274517, at *15 (quoting Meeropol, 790 F.2d at 953); accord Aland, 2014 WL 4680747, at *2 (finding no bad faith where FOIA requester failed to support allegations that defendants had intentionally provided nonresponsive documents and that additional responsive records existed). While the Court sympathizes with plaintiff's frustration concerning defendant's delayed and piecemeal response to the 4/30/13 FOIA Request, plaintiff has now received an adequate response, and may not continue this litigation purely to vent his disappointment with the results.[19]

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[19] Though styled as a motion for partial summary judgment under Rule 56(a) of the FRCP, plaintiff's cross-motion more closely resembles a request for discovery, see Pl. SJ Mot. ¶¶ 1, 3–5, to which he is not entitled, see 9/16/15 Minute Order at 1–2; 11/9/15 M&O at 1–2. Where plaintiff asks the Court to determine "DOJ's responsibility for providing copies of records duly requested under FOIA that are or may be publicly available[,]" Pl. SJ Mot. ¶ 2, the statute is clear: Materials an agency makes public need not be produced in response to specific FOIA requests, see 5 U.S.C. §§ 552(a)(2) & (a)(3)(A). In any event, defendant *has* provided publicly available materials to plaintiff as a courtesy. See, e.g., Def. SJ Reply at 9 n.6; Singh Decl., Ex. K, at 63–67.

Plaintiff also claims a right under the First Amendment to "access judicial records that evidence the legal basis of the [g]overnment's prosecution of activists." Pl. SJ Mem. at 11 (citing United States v. Erie Cnty., 763 F.3d 235, 239 (2d Cir. 2014) (emphasis omitted)). But "judicial records" to which the qualified First Amendment right of public access applies are those that are both filed with the court and "relevant to the performance of the judicial function and useful in the judicial process." Erie Cnty., 763 F.3d at 240 (citation omitted). Plaintiff fails to explain why a supposedly secret DOJ memo instructing prosecutors in connection with targeting activists for prosecution—even if such a document did exist—would constitute a judicial document.

**B. Plaintiff's Motion Under Rule 52 and Demand for Sanctions and Penalties**

Rule 52(a)(6) of the FRCP provides that "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial courts' opportunity to judge the witnesses' credibility." Plaintiff invokes this rule to argue that the Court should "set[] aside some of its findings" from the September 16, 2015 initial conference and 11/9/15 M&O, and order DOJ to answer plaintiff's 4/30/13 and 8/17/15 FOIA Requests. Pl. R. 52 Mem. at 8.

Rule 52 is not relevant to plaintiff's request, as there have been no findings of fact, witness examinations, or evidentiary hearings in this matter. Indeed, for the reasons stated above, this Court has concluded that this case presents "no genuine dispute as to any material fact . . . ." Fed. R. Civ. P. 56(a). Plaintiff's Rule 52 motion therefore also appears to be a reiteration of his request for discovery, which this Court found to be unwarranted. See 9/16/15 Minute Order at 1–2; 11/9/15 M&O at 1–2. Plaintiff's request for "sanctions and penalties in an amount . . . not less than $1 million," Pl. R. 52 Mem. at 43, should likewise be denied, as he has not shown that DOJ acted in bad faith or otherwise culpably.[20] Similarly, plaintiff proffers no basis for the appointment of a monitor to oversee DOJ's responses to FOIA requests.[21]

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[20] FOIA does not provide for monetary sanctions or penalties as a remedy. See generally 5 U.S.C. § 552. Though courts have broad inherent powers to impose sanctions, these are appropriate only where the party to be sanctioned has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Chambers v. NASCO, Inc., 501 U.S. 32, 45–46 (1991) (internal quotation marks omitted).

[21] "[E]xternal monitors have been found to be appropriate where consensual methods of implementation of remedial orders are unreliable or where a party has proved resistant or intransigent to complying with the remedial purpose of the injunction in question." United

## CONCLUSION

For the foregoing reasons, the undersigned magistrate judge respectfully recommends that defendant's motion for summary judgment be granted in its entirety, and that plaintiff's cross-motions for summary judgment and for sanctions and penalties be denied.

Any objections to this Report and Recommendation must be filed with the Honorable Joan M. Azrack on or before **October 21, 2016**. Failure to file objections in a timely manner may waive a right to appeal the District Court order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72; Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989) (*per curiam*).

**SO-ORDERED.**

**Dated:** **Brooklyn, New York**
**October 4, 2016**

/s/ *Roanne L. Mann*
**ROANNE L. MANN**
**CHIEF UNITED STATES MAGISTRATE JUDGE**

States v. Apple Inc., 992 F.Supp.2d 263, 280 (S.D.N.Y. 2014), aff'd, 787 F.3d 131 (2d Cir. 2015) (internal quotation marks omitted). Here, plaintiff has not shown that he is entitled to an injunctive remedy, let alone a monitor to ensure compliance with an injunctive remedy.